

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08	ANDREA HARRIS,)	CASE NO. C07-1832 RAJ
)	
09	Plaintiff,)	
)	
10	v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY
11	MICHAEL J. ASTRUE,)	DISABILITY APPEAL
	Commissioner of Social Security,)	
12)	
	Defendant.)	
13	_____)	

Plaintiff Andrea Harris proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance (DI) and Supplemental Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ). In her reply brief, plaintiff requested oral argument. Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court finds oral argument to be unnecessary, and recommends that this matter be REMANDED for further administrative proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1966.¹ She completed four years of college and earned a Bachelor of Science degree in Social Work. Plaintiff previously worked as a nurse assistant and in medical transport. (AR 33-34.)

Plaintiff filed a DI application and a SSI application on May 20, 2002, alleging disability beginning December 31, 1998 due to an affective disorder (bipolar disorder) and irritable bowel syndrome. (AR 36-37.) Her applications were denied at the initial level and on reconsideration, and she timely requested a hearing.

ALJ Verrell Dethloff held a hearing on June 23, 2004, issuing a decision on August 4, 2004 finding plaintiff not disabled. (AR 407-418.) Plaintiff requested review of the hearing decision. Finding the hearing tape to be lost and incorrect earnings records to have been utilized, the case was remanded by the Appeals Council for a *de novo* hearing, which was conducted by Judge Dethloff on December 8, 2005. (AR 676-90.) At that hearing, plaintiff amended her disability onset date to January 2001. On March 31, 2006, the ALJ issued a decision finding plaintiff not disabled. (AR 542-54.) Plaintiff requested review, and the Appeals Council vacated and remanded the case to another ALJ for hearing. (AR 561-62.) Because of the remand for further consideration of the case, a subsequently-filed claim for SSI benefits was subsumed into the pending claim.

ALJ M.J. Adams conducted a hearing on January 9, 2007, taking testimony from plaintiff

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 and Susan Stewart, a vocational expert. (AR 691-725.) ALJ Adams issued a decision on April
02 9, 2007, finding plaintiff not disabled. (AR 25-35.)

03 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
04 September 12, 2007 (AR 9-12), making the ALJ's decision the final decision of the Commissioner.
05 Plaintiff appealed this final decision of the Commissioner to this Court.

06 **JURISDICTION**

07 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

08 **DISCUSSION**

09 The Commissioner follows a five-step sequential evaluation process for determining
10 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
11 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
12 engaged in substantial gainful activity since her alleged onset date. At step two, it must be
13 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's bipolar
14 disorder and irritable bowel syndrome severe. Step three asks whether a claimant's impairments
15 meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or
16 equal the criteria for any listed impairment, whether considered singly or in combination. If a
17 claimant's impairments do not meet or equal a listing, the Commissioner must assess residual
18 functional capacity (RFC) and determine at step four whether the claimant has demonstrated an
19 inability to perform past relevant work. The ALJ found plaintiff capable of all levels of physical
20 exertion. The ALJ found plaintiff restricted in her RFC by non-exertional limitations stemming
21 from her mental impairment, and found plaintiff able to understand, remember and carry out simple
22 instructions, make judgments commensurate with the functions of unskilled work (i.e., simple

01 work-related decisions), able to respond appropriately to supervision, co-workers and unusual
02 work situations, and able to deal with changes in a routine work setting. The ALJ also found
03 plaintiff able to perform work activity on a consistent basis and to maintain regular attendance and
04 complete a normal workday and work week. The ALJ determined that plaintiff was not able to
05 perform her past relevant work. If a claimant demonstrates an inability to perform past relevant
06 work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains
07 the capacity to make an adjustment to work that exists in significant levels in the national
08 economy. Relying on the testimony of the vocational expert, the ALJ concluded that plaintiff
09 could perform other work, such as work as a transporter of patients, a cleaner, and a courier
10 messenger. Therefore, the ALJ found plaintiff not disabled.

11 This Court's review of the ALJ's decision is limited to whether the decision is in
12 accordance with the law and the findings supported by substantial evidence in the record as a
13 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
14 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
15 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
16 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
17 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
18 2002).

19 Plaintiff argues² that the ALJ failed to give appropriate weight to the opinions of her

20
21 ² Plaintiff's Opening Brief contains a lengthy Statement of Facts. The parties are reminded
22 that such a recitation is unnecessary and, in fact, discouraged. Rather, a discussion of the relevant
facts and portions of the administrative record should be conducted in the context of specific
assignments of error.

01 treating and examining physicians, failed to properly consider her testimony, erred in concluding
02 her impairments did not meet or equal a listing, improperly assessed her RFC, and failed to meet
03 the burden of showing that other jobs exist in the national economy which she could perform. She
04 requests remand for an award of benefits or, in the alternative, for further administrative
05 proceedings before a different ALJ. The Commissioner argues that the ALJ's decision is
06 supported by substantial evidence and should be affirmed.

07 Step Three Finding - Listing of Impairments

08 The third step of the sequential evaluation of disability followed by the Commissioner in
09 evaluating disability claims is to determine whether a claimant has any impairment which meets
10 or equals an impairment described in the SSA's Listing of Impairments, 20 C.F.R. Part 404, Subpt.
11 P, App. 1. Although the Commissioner's determinations at steps four and five may be based on
12 credibility assessments, step three determinations are made purely on the medical evidence,
13 without consideration of age, education, or work experience. *Bates v. Barnhart*, 222 F. Supp. 2d
14 1252, 1258 (D. Kan. 2002). The listed impairments are considered so severe as to preclude
15 substantial gainful activity.

16 An impairment simply names a disorder, while a listing sets out the criteria from which it
17 can be determined whether the impairment is of sufficient severity to raise a presumption of
18 disability. *Petition of Sullivan*, 904 F.2d 826, 840 (3d Cir. 1990). It is not enough for a claimant
19 to show she has one of the listed impairments; she must show that her impairment meets or equals
20 the severity and durational requirements in order to be found *per se* disabled at step three. *Young*
21 *v. Sullivan*, 911 F.2d 180, 181 (9th Cir. 1990). In other words, the diagnosis of the impairment
22 is not enough. The claimant must show that she has the *findings* shown in the listing of that

01 impairment. *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). Although opinions from
02 medical sources will be considered on issues such as whether a claimant meets or equals a listing,
03 the final responsibility for deciding the issue is reserved to the Commissioner. 20 C.F.R. §§
04 404.1527(e)(2), 416.927(e)(2).

05 The Listing of Impairments includes Mental Disorders, arranged in nine diagnostic
06 categories. 20 C.F.R. Part 404, Subpt. P, App. 1 § 12.00. Plaintiff contends she meets the listing
07 requirements of § 12.04 (affective disorders) and should have been found disabled on this basis.³
08 Defendant argues that the ALJ properly evaluated the conflicting medical evidence and properly
09 concluded that plaintiff's mental impairment caused limitations but was not *per se* disabling.

10 The required level of severity for a § 12.04 affective disorder is met when there is medical
11 substantiation of the presence of a mental disorder (the "A" criteria, not at issue in this case), plus
12 at least two levels of functioning are found to be "markedly" impaired (the "B" criteria), or if
13 certain other specified functional criteria are satisfied (the "C" criteria). In finding that plaintiff's
14 bipolar disorder did not meet the requirements of the listing for affective disorders, the ALJ found
15 as follows:

16 As for the claimant's bipolar disorder, it is found under medical listing 12.04. In
17 assessing the claimant's functional limitations under the "B" criteria, the
18 Administrative Law Judge finds the claimant has a mild restriction of activities of daily
19 living; mild difficulties in maintaining social functioning; moderate difficulties in
20 maintaining concentration, persistence and pace; and no episodes of decompensation.
21 With these functional limitations, the claimant's bipolar disorder does not fulfill the
22 "B" criteria and therefore fails to meet medical listing 12.04.

20 The Administrative law Judge has also considered whether the bipolar [disorder]

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22 ³ The ALJ also found that plaintiff's irritable bowel syndrome does not meet the
requirements of any digestive body system listing (AR 29), a finding plaintiff does not dispute.

meets this listing through its “C” criteria. But it does not do so because the claimant does not have repeated episodes of decompensation; she does not have such marginal adjustment that even a minimal increase in mental demands or change in environment would be expected to cause decompensation; and she does not have 1 or more years’ inability to function outside a highly supportive living arrangement.

(AR 29.)

Plaintiff contends, without specific citation to the medical record, that the opinions of Zsolt Lorant, M.D., and therapist Jo Ann Shepherd support a finding that she meets both the B and C criteria of Listing 12.04. It appears plaintiff has in mind certain opinions cited elsewhere in her Opening Brief. (*See* Dkt. 17 at 15) (“cl. became vegetative and incoherent” (AR 446); noting marked restrictions in activities of daily living, extreme difficulties in maintaining social functioning, marked deficiencies of concentration, and three episodes of decompensation (AR 529-33).)

While the ALJ is not bound by the opinion of a treating doctor, he must explain why “significant, probative evidence has been rejected.” *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642 F.2d 700, 706 (9th Cir. 1981)). An ALJ may reject the uncontradicted medical opinion of a treating physician only for “clear and convincing reasons supported by substantial evidence in the record.” *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001) (emphasis added) (citing *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)).

This higher standard is required because the treating physician “is employed to cure and has a greater opportunity to know and observe the patient as an individual.” *Bates v. Sullivan*, 894 F.2d 1059, 1063 (9th Cir. 1990) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987)).

In reaching the conclusion that plaintiff’s bipolar disorder did not meet the requirements

01 of Listing 12.04, the ALJ implicitly rejected the opinions of plaintiff's treating provider. Yet, the
02 ALJ gave no reasons, let alone "clear and convincing" ones, for rejecting the opinions. Nor were
03 the ALJ's affirmative findings about the "B criteria" levels of plaintiff's functioning supported by
04 any references to the record. (AR 29 (finding "mild" restriction of activities of daily living, "mild"
05 difficulties in maintaining social functioning, "moderate difficulties in maintaining concentration,
06 persistence and pace").) "We require the ALJ to build an accurate and logical bridge from the
07 evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's
08 ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). The ALJ's step three
09 finding is not supported by substantial evidence. The remedy for this error is discussed below.

10 Physicians' Opinions

11 Plaintiff contends that the ALJ did not give appropriate weight to the opinions of her
12 treating providers, citing at length numerous opinions and diagnoses from various medical
13 providers without comment or argument. The scope of her actual assignment of error, however,
14 is more limited. Plaintiff cites the opinion of her treating providers at Seattle Mental Health, Dr.
15 Lorant and therapist Shepherd, who wrote on January 3, 2007:

16 It is our opinion that Andrea can not enter the work force at this time nor has she
17 been able to do so at any time during the course of treatment at Seattle Mental
18 Health. It is our hope that in the future she may be able to return to school part-time
19 and find a career that she can do on a part-time basis while maintaining important self-
20 care and parenting responsibilities in her life. We are recommending that Andrea be
21 placed on Social Security benefits.

22 (AR 656.)

21 Plaintiff argues that the reasons given by the ALJ for rejecting this opinion were not
22 convincing, contending the opinion was uncontradicted and, therefore, entitled to the highest

weight. A treating physician's opinion is not necessarily conclusive as to either a physical condition or the ultimate issue of disability. *Rodriguez v. Bowen*, 876 F.2d 759, 761-62 & n.7 (9th Cir. 1989). The ALJ may disregard a treating physician's opinion whether or not that opinion is contradicted. *See id.*; *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986). However, where uncontradicted, the ALJ must provide clear and convincing reasons for doing so. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998).

In addressing the opinion of Dr. Lorant and Ms. Shepherd that plaintiff could not work, the ALJ stated as follows:

But their opinion in this letter is not convincing. They refer time and time again to what the claimant told them about her symptoms and about their frequency and accept these allegations apparently at face value. Furthermore, the letter does not support the conclusion that the claimant could not work. Dr. Lorant and therapist Shepherd note that the claimant had been able to complete 45 credits at college. This letter also indicated that the claimant had finally recognized that she had a bipolar disorder; that she had stabilized to the point that her "episodes" were not as lengthy or as severe; and that she had been able to problem solve and set boundaries. These improvements are not consistent with the alleged inability to perform any work activity.

(AR 33; internal citations to administrative record omitted.).

The ALJ's conclusion that Dr. Lorant and Ms. Shepherd accepted what plaintiff told them at face value is not supported by substantial evidence. The ALJ did not connect this conclusion to any specific reference to the medical records, and a review of the treatment notes of these providers compels a contrary conclusion. During clinical sessions, therapist Shepherd appeared to have no reluctance to challenge plaintiff's self-assessments, or to re-direct plaintiff's perceptions. (*See, e.g.*, AR 359, 362, 449, 452, 463, 483.)

The ALJ gave other reasons for rejecting the conclusion of these providers that plaintiff cannot work, noting plaintiff had completed 45 credits at college, had come to recognize that she

01 had a bipolar disorder, had stabilized to the point that her episodes were not as lengthy or as
02 severe, and had been able to problem solve and set boundaries. (AR 33.) However, the ALJ failed
03 to acknowledge or discuss the opinions of the same treatment providers diminishing the
04 persuasiveness of these particular factors as evidence of plaintiff's ability to work. As Dr. Lorant
05 and Ms. Shepherd noted in their January 3, 2007 report, while plaintiff completed 45 credits of
06 college, she ultimately had to quit school because of hypo-manic episodes that ended in exhaustion
07 and depression. (AR 654.) While the providers noted plaintiff's progress in accepting the
08 diagnosis of bipolar disorder, as well as significant gains in understanding and managing her mental
09 health conditions and in setting boundaries, they also noted problematic patterns, cognitive
10 distortions, dysfunctional relationship dynamics, and lack of ability to moderate her activities and
11 set appropriate self care boundaries for herself, fueling episodes of hypo-manic and subsequent
12 depressive cycles. (AR 655-56.)

13 Plaintiff also criticizes the ALJ's consideration of Ms. Shepherd's report of May 2004,
14 stating that plaintiff was easily stressed and that her mood lability significantly impaired her ability
15 to complete daily tasks and maintain employment. (AR 395.) The ALJ found the opinion about
16 plaintiff's situation "during a depressed mood . . . not supported by other evidence in the record",
17 noting plaintiff "often does not experience her alleged mental symptoms." (AR 33.) However, the
18 question before the Commissioner is plaintiff's "ability to work on a *sustained* basis. . . .
19 Occasional symptom-free periods—and even the sporadic ability to work—are not inconsistent with
20 disability." *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995) (citing 20 C.F.R. § 404.1512(a))
21 (emphasis in opinion.) The fact that plaintiff may experience occasional improvement in her
22 symptoms of depression does not negate the disabling effect of that condition on her overall ability

01 to sustain work.

02 Plaintiff also points to the ALJ's failure to address other material medical evidence,
03 including the opinion of Shoshanna Press, M.D., that "the likelihood of recovery is poor and I
04 believe her condition will stay the same or deteriorate over the next twelve months, based on the
05 examination today, findings, and her current situation" (AR 212) and the opinions of ARNP
06 Kempf about the impact of plaintiff's difficulties with concentration, completing tasks in a timely
07 manner, and persistence on her ability to work (AR 392). Although the Commissioner does not
08 address the lack of reference to ARNP Kempf's opinions, he suggests that Dr. Press's opinion
09 about plaintiff's prognosis was taken out of context, and that her prognosis was poor only because
10 she had ceased to take her medication during pregnancy. However, the ALJ cited, and presumably
11 relied on, Dr. Press's opinion in analyzing plaintiff's credibility. (AR 31.) The failure of the ALJ
12 to later explain what weight was given to this opinion cannot be said to be harmless. *See Vincent*,
13 739 F.2d at 1394 (requiring the ALJ's findings to be sufficiently detailed "to permit courts to
14 review those decisions intelligently.") (citing *Lewin v. Schwieker*, 654 F.2d 631, 634 (9th Cir.
15 1981)).

16 In sum, plaintiff demonstrates error in the ALJ's assessment of the physicians' opinions.
17 Again, the remedy for this error is discussed below.

18 Credibility Assessment

19 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
20 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). In
21 finding a social security claimant's testimony unreliable, an ALJ must render a credibility
22 determination with sufficiently specific findings, supported by substantial evidence. "General

findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In discussing plaintiff's testimony, the ALJ found as follows:

At the hearing, the claimant testified that she was alone at home after she sent her two children off to school and to preschool. According to her self-report, it took her a long time in accomplishing tasks during the day, but this depended on how she felt at the start of the day. She reported increased difficulties if she had increased stress, which would occur if she had two appointments in one day. Her testimony indicated that she had experienced an anxiety attack prior to her appearance at the hearing.

The claimant testified that she arose in the morning to prepare breakfast for her children. Although she stated that she is able to drive a car, she usually takes a bus for transportation. She reported "good phases" in which she experienced a very high energy level in which she overbooked her activities, had difficulty in sleeping, and did projects at night. During a "bad phase", she was depressed and unable to function, according to her testimony. The claimant also complained about such side effects with her medications, as problems with focus.

In regard to her stomach complaints, the claimant reported that she had thought the problem was irritable bowel syndrome, but an ulcer was found in her intestine. She reported diarrhea and pain and the sensation of a bowel movement but "nothing happens".

The claimant also testified that she was unable to work due to stress that caused pain, anxiety attacks, and uncontrolled emotions.

After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairment could reasonably be expected to produce the alleged symptoms, but that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible.

01 The medical evidence does not support the degree of impairment alleged by the
02 claimant. In fact, the medical evidence indicates improvement in her mental status
03 when she took her medication. For instance, the claimant declared in March 2001
04 that she was feeling better. By her self-report in June 2002, the use of Zoloft helped
05 her mental disorder. In June 2003, the claimant stated that her mood had improved,
as had her energy level. She reported in September 2003 that she was "...doing much
better" with more focus and an improved ability to plan. An increase in her symptoms
began when the claimant was not taking any psychotropic medications during her
pregnancies.

06 The question, then, has simply become one of treatment. As reported by Shoshanna
07 Press, M.D., in 2002, the claimant's problems were treatable, but she was not getting
the treatment that she needed.

08 Her level of activity is contradictory to her allegations of disability. In 2002, the
09 claimant reported that she arose in the morning at 7:00 am to get her son ready for
school. Afterward, she fixed her breakfast, went to her appointments. Her testimony
also confirmed this routine. She alleged that her functioning was much lower on her
10 "bad" days in which she allegedly required a longer period of time to shower and
dress. According to the claimant, "bad" days encompassed 80% of the month.

11 But this allegation is not credible. If the claimant had so many bad days, it would
12 have adversely affected her ability to care for her children, which the claimant has not
alleged.

13 Furthermore, evaluations of the claimant throughout the time period since her alleged
14 disability onset date have revealed rather normal findings. In February 2002, Edward
Walker, M.D., reported that the claimant spoke without any latency. She also
15 evidenced tightly associated thoughts, intact memory and attention, and good insight
and judgment, despite a depressed mood and constricted affect. Two weeks later, the
16 claimant was described as an individual who had a normal mood and affect, full
orientation, with high insight and awareness. In June 2002, Shoshanna Press, M.D.,
17 reported that the claimant was fully oriented with the ability to remember 3 out of 3
objects after the passage of 5 minutes. She also had sufficient concentration to
18 perform serial 3's. This doctor found that the claimant was a capable individual who
could manage her own funds and whose judgment was intact.

19 In May 2003, Carole Hayes, BA, CDP, MA, of Seattle Mental Health, described the
20 claimant as a well groomed individual with good eye contact, normal speech,
appropriate thought content, intact immediate, recent and remote memory, and no
21 cognitive impairments. Similar normal findings were made in July 2003, August
2003, January 2005, February 2005, May 2005, June 2005, August 2005, October
22 2005, and December 2005.

01 In fact, the times of increased mental symptoms were usually due to particular
02 problems. The claimant has had on-going problems with her ex-husband. She has
03 struggled with poverty and, as an immigrant from Germany, she has also struggled
04 with cultural stress. As noted by a chart noted [sic] in March 2002, the claimant's
05 symptoms were a normal response to "...several extreme stressors".

06 In 2003, the claimant complained that medications had helped a great deal, but she
07 recently felt tired. But fatigue is a normal situation for a single parent with two
08 children.

09 Furthermore, the claimant's allegations of disability provide a secondary gain. In
10 December 2001, the claimant complained that she felt unable to perform the work
11 program that the Washington State Department of social and Health Services was
12 advising for her. Thus, her allegations of disability were a means to prevent her return
13 to work activity.

14 Additionally, the claimant seems to have a sense of entitlement without a sense of
15 responsibility. In November 2004, the claimant expressed her desire to have a 3rd
16 child, although she complained about feeling overwhelmed with no break from taking
17 care of her 2 children. She declared that it would not make sense for her to go back
18 to work with her bipolar disorder and with insufficient support in childcare and
19 "...besides she wants to have a third child." Thus, it appears that the claimant simply
20 wanted to have another baby rather than return to work. As noted by her therapist,
21 the claimant wanted to make choices for herself using other peoples' resources.
22

(AR 31-33; internal citations to administrative record omitted.)

Plaintiff contends, *inter alia*, that the ALJ failed to give adequate consideration to her testimony about her symptoms and functional limitations. She argues that improvement in her mental status when she took medication does not overcome the fact that her symptoms vary in intensity from day to day due to her bipolar disorder. She contends that none of the activities cited by the ALJ are inconsistent with her testimony about her difficulties, and do not show she is able to perform any type of full-time employment. Plaintiff disputes the suggestion that she must show an inability to care for her children in order to be found disabled, or that her reports of tiredness should be attributed to her status as a single parent rather than a side effect of her medications or

01 a symptom of depression. She disagrees that her symptoms “were usually due to particular
02 problems” or that her stated inability to work is evidence of secondary gain.

03 The Commissioner avers that plaintiff engaged in daily activities inconsistent with her level
04 of alleged pain or other symptoms and that, despite needing more time to complete tasks, plaintiff
05 was able to get her children off to school and pre-school, care for them generally, keep her
06 appointments, fix meals, complete 45 credits of college credits, and utilize public transportation.
07 The Commissioner acknowledges that these activities do not necessarily show plaintiff was capable
08 of performing all work activity, nevertheless they are inconsistent with her alleged level of
09 impairment and would allow an adverse credibility inference. Further, the Commissioner points
10 to the evidence of secondary gain and lack of motivation, as well as plaintiff’s sense of entitlement
11 and the concerns of her therapists that she wanted to make choices for herself using other people’s
12 resources.

13 With the possible exception of the incomplete reference to plaintiff’s ability to complete
14 45 college credits, addressed previously in this Report and Recommendation, the ALJ’s
15 interpretation as to the inconsistencies in the record between plaintiff’s testimony and her various
16 activities appears rational. Credibility determinations are the province of the ALJ *Fair v. Bowen*,
17 885 F.2d 597, 604 (9th Cir. 1989). The ALJ may use “ordinary techniques of credibility
18 evaluation” to evaluate the claimant’s testimony and, if specific, clear and convincing reasons are
19 provided for rejecting the testimony, the ALJ will be upheld. *Thomas*, 278 F.3d at 960. If the
20 ALJ’s credibility finding is supported by substantial evidence in the record, we may not engage in
21 second-guessing. Although plaintiff urges a different conclusion, we must uphold the ALJ’s
22 interpretation, if rational. *Id.* at 954.

01 Here, the ALJ did not totally reject plaintiff's testimony about her problems, but, rather,
02 found that the problems did not exist to the extent alleged. Not all of an ALJ's reasons for
03 discrediting a claimant must be upheld, so long as substantial evidence supports the ALJ's
04 credibility conclusion. *Batson v. Commissioner of the Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th
05 Cir. 2004). Plaintiff fails to support her contention that the ALJ failed to provide clear and
06 convincing reasons in evaluating the credibility of her testimony.

07 Residual Functional Capacity

08 The ALJ assessed plaintiff's RFC as follows:

09 The claimant does not have exertional limitations. According to the assessment
10 performed by Kathy Thomas, M.D., in November 2006, the claimant is able to sit,
11 stand and walk each for 8 hours a day. Additionally, she was found to be able to lift
12 and carry up to 50 pounds occasionally.

13 In regard to the claimant's non-exertional limitations in her residual functional
14 capacity (RFC) stemming from her mental impairment, the Administrative Law Judge
15 finds the claimant is able to understand, remember and carry out simple instructions;
16 make judgments commensurate with the functions of unskilled work, i.e. simple work-
17 related decisions; can respond appropriately to supervision, co-workers, and usual
18 work situations; and can deal with changes in a routine work setting.

19 The evaluation performed by Shoshanna Press, M.D., provides support for these
20 conclusions. After examining the claimant in June 2002, this doctor concluded that
21 the claimant could accept instructions from supervisors, interact with coworkers and
22 the public. She was also found to be able to perform work activity on a consistent
basis and to maintain regular attendance and complete a normal workday and work
week.

(AR 29-30; internal citations to administrative record omitted.)

Plaintiff argues that the ALJ's evaluation of her RFC was erroneous because of the
improper rejection or lack of proper consideration of the opinions of Dr. Lorant and Ms.
Shepherd, and because of the failure to consider the opinions of Ms. Kempf and the totality of the

01 opinions of Dr. Press. The Commissioner points out that no doctor's opinion is conclusive on the
02 issue of plaintiff's ability to work, and avers that the ALJ's RFC finding included all work-related
03 limitations demonstrated by the reliable evidence. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1164-
04 65 (9th Cir. 2001) ("An ALJ is free to accept or reject restrictions in a hypothetical question that
05 are not supported by substantial evidence.") Also, while conceding that the ALJ erred in
06 concluding that plaintiff retained the exertional capacity for a full range of work, rather than the
07 capacity for medium work as opined by Dr. Thomas, the Commissioner argues that the error is
08 harmless in light of the fact that jobs identified by the ALJ as within plaintiff's capacity were
09 limited to medium capacity jobs.

10 Because of the error identified in the ALJ's consideration of the opinions of plaintiff's
11 treating providers, the finding regarding her RFC is necessarily called into question. As such,
12 plaintiff identifies reversible error in the ALJ's assessment of her RFC.

13 Step Five Finding

14 The Commissioner can satisfy his burden of showing that claimant can perform other work
15 that exists in significant numbers in the national economy by utilizing the testimony of a vocational
16 expert (VE) to describe what jobs the claimant can perform, given his or her RFC, as well as the
17 availability of such jobs. *Tackett v. Apfel*, 180 F3d 1094, 1101 (9th Cir. 1999). Plaintiff maintains
18 that the Commissioner failed to meet this burden, again pointing to errors in the ALJ's assessment
19 of the various medical opinions as necessarily implicating the ALJ's step five determination. The
20 Commissioner asserts that the ALJ properly posed a hypothetical based on limitations supported
21 by the record and, based on the testimony of the VE, determined plaintiff could perform other
22 work at step five.

01 To be valid, a hypothetical posed to a VE must include all of the claimant's functional
02 limitations supported by the record. *Thomas*, 278 F.3d at 956 (citing *Flores v. Shalala*, 49 F.3d
03 562, 570-71 (9th Cir. 1995)). A VE's testimony based on an incomplete hypothetical lacks
04 evidentiary value to support a finding that a claimant can perform jobs in the national economy.
05 *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (citing *DeLorme v. Sullivan*, 924 F.2d 841,
06 850 (9th Cir. 1991)). Without the evidentiary foundation of the opinion of the VE, the ALJ's step
07 five finding lacks substantial evidence.

08 Here, the ALJ's step five finding was premised on the opinion testimony of a VE, who
09 identified jobs appropriate for an individual with the RFC described in a hypothetical propounded
10 by the ALJ. Therefore, as with plaintiff's RFC, the error in the consideration of the opinions of
11 plaintiff's treating providers implicates the ALJ's step five determination.

12 Remedy

13 "Where the Commissioner fails to provide adequate reasons for rejecting the opinion of
14 a treating or examining physician, [the Court credits] that opinion as 'a matter of law.'" *Lester*,
15 81 F.3d at 834 (finding that, if doctors' opinions and plaintiff's testimony were credited as true,
16 plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir.
17 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true,
18 the evidence supports a finding of disability. *See, e.g., Schneider v. Commissioner of Social Sec.*
19 *Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given
20 the effect required by the federal regulations, it becomes clear that the severity of [plaintiff's]
21 functional limitations is sufficient to meet or equal [a listing.]"); *Smolen v. Chater*, 80 F.3d
22 1273,1292 (9th Cir. 1996) (ALJ's reasoning for rejecting subjective symptom testimony,

01 physicians' opinions, and lay testimony legally insufficient; finding record fully developed and
02 disability finding clearly required).

03 Plaintiff argues incorrectly that this Court "must" credit the opinions of a treating doctor
04 as true, if the ALJ's reasons for rejecting the opinions lack substantial evidence. (Dkt. 17 at 14.)⁴
05 To the contrary, courts retain flexibility in applying this "'crediting as true' theory." *Connett v.*
06 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there
07 were insufficient findings as to whether plaintiff's testimony should be credited as true). The
08 decision whether to remand for further proceedings or for an award of benefits is within the
09 discretion of this Court. *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001) (citing
10 *Reddick v. Chater*, 157 F.3d 715, 728 (9th Cir. 1998)). Remand is proper where additional
11 administrative proceedings could remedy the defects in the decision. *Barbato v. Commissioner*
12 *of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1277 (C.D. Cal. 1996) (citing *McAllister v. Sullivan*, 888
13 F.2d 599, 603 (9th Cir 1990) and *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990) ("We
14 exercise our discretion not to award benefits because there may be evidence in the record to which
15 the ALJ can point to provide the requisite specific and legitimate reasons for disregarding [the
16 treating physician's] opinion."))

17 The Court is mindful that three previous administrative hearings have been conducted in
18 this case, one being necessitated by misplacement of the hearing tape. Nevertheless, the Court
19

20 ⁴ Indeed, plaintiff argues, without the citation of authority, that the opinions of all of her
21 treating providers should be credited as true because of the ALJ's improper rejection of the
22 opinions of Dr. Lorant and Ms. Shepherd, and the failure to consider the opinions of Ms. Kempf
and Dr. Press. (Dkt. 17 at 15 and Dkt. 19 at 6.)

01 finds that remand for an award of benefits is not warranted. The Court does not find error in the
02 ALJ's consideration of the credibility of plaintiff's testimony. Although the ALJ's consideration
03 of some of the medical opinions was deficient, the record as it stands, including the medical
04 evidence, does not necessarily compel a finding of disability. Therefore, the matter should be
05 remanded for further administrative proceedings consistent with this Report and Recommendation.

06 Allegation of Bias

07 Plaintiff also argues that, if remanded for a new hearing, this matter should be assigned to
08 a different ALJ. The Commissioner objects to this request, asserting that plaintiff has pointed to
09 nothing in the record that would demonstrate bias such that a reassignment to a different ALJ
10 is required.

11 In order to justify the assignment of a new ALJ based on a claim of bias, plaintiff must
12 show that "the ALJ's behavior, in the context of the whole case, was "so extreme as to display
13 clear inability to render fair judgment." Bayliss v. Barnhart, 427 F.3d 1211, 1214-15 (9th Cir.
14 2005) (quoting Rollins v. Massanari, 261 F.3d 853, 858 (9th Cir. 2001) (quoting Liteky v. United
15 States, 510 U.S. 540, 551 (1994))). The Court starts with the presumption that the ALJ was
16 unbiased. Id. at 1215 (citing Schweiker v. McClure, 456 U.S. 188, 195 (1982)). Plaintiff can rebut
17 the presumption by showing a "conflict of interest or some other specific reason for
18 disqualification." Id. (quoting Schweiker, 456 U.S. at 195).

19 As argued by the Commissioner, there is no indication of bias on the part of the ALJ in this
20 case. This Court routinely remands matters to ALJs who previously questioned the credibility of
21 claimants. In the absence of a showing to the contrary, the Court must presume that the ALJ
22 would remain unbiased on remand.

CONCLUSION

For the reasons set forth above, this matter should be REMANDED for further administrative proceedings. The ALJ should reevaluate the opinions of the medical providers as described herein, and reconsider the issue of whether plaintiff's bipolar disorder meets the listing requirements for an Affective Disorder at step three of the sequential analysis. Following that reconsideration and reevaluation, if necessary, the ALJ should enter findings as to plaintiff's RFC and proceed to steps four and five of the sequential analysis.

DATED this 3rd day of June, 2008.



Mary Alice Theiler
United States Magistrate Judge